Council of Defense and Space Industries Associations
1000 Wilson Boulevard, Suite 1800
Arlington, VA 22209
www.codsia.org
(703) 243-2020

August 22, 2005

Ms. Amy Williams
Defense Acquisition Regulations Council
OUSD (AT&L)/DPAP (DAR)
IMD 3C132
3062 Defense Pentagon
Washington, D.C. 20301-3062

Ref: DAR Case 2004-D-017 (Combating Trafficking in Persons)

CODSIA Case No 04-05

By email: dfars@osd.mil

Dear Ms. Williams:

On behalf of the Council of Defense and Space Industries Associations (CODSIA), we are pleased to submit comments on the referenced proposed rule, published in the Federal Register on June 21, 2005 (70 F.R. 35603 et. seq.). The proposed rule would amend the Defense Federal Acquisition Regulations (DFARS) to implement policy prohibiting DoD contractor employees from engaging in activities that support or promote trafficking in persons.

Formed in 1964 by the industry associations with common interests in the defense and space fields, CODSIA is currently composed of six associations representing over 4,000 member firms across the nation. Participation in CODSIA projects is strictly voluntary. A decision by any member association to abstain from participating in a particular activity is not necessarily an indication of dissent.

Introduction

Through the enactment of the Victims in Trafficking and Violence Protection Act of 2000, as amended (22 U.S.C. 7102, et. seq.) and other actions, Congress has clearly established the United States government's policy to strongly oppose trafficking in persons. Additional legislation is pending that would further strengthen the federal government's activities to combat such trafficking.

The unclassified version of the December 16, 2002 National Security Presidential Directive 22 directs federal agencies to strengthen efforts, capabilities, and coordination to support the policy to combat trafficking in persons. In that directive, the President

provided that the "United States hereby adopts a 'zero tolerance' policy regarding United States government employees and contractor personnel representing the United States abroad who engage in trafficking in persons."

This presidential directive was followed by the January 30, 2004 Deputy Secretary of Defense Wolfowitz memo entitled "Combating Trafficking in Persons in the Department of Defense." The memo declares the policy of the Defense Department "that trafficking in persons will not be facilitated in any way by the activities of our Service members, civilian employees, indirect hires, or DoD contract personnel." One of the objectives of the DoD's follow-on efforts included in the Secretary's memo provides for "the incorporation of provisions in overseas services contracts that prohibit any activities on the part of contractor employees that support or promote trafficking in persons and impose suitable penalties on contractors who fail to monitor the conduct of their employees."

As associations representing government contractors, many of whom are actively supporting a wide range of United States government contracts throughout the world, we strongly share in the policy of combating trafficking in persons. Thus, as we analyzed the proposed rule, we identified concerns in the proposed rule regarding (1) the clarity of the requirements; (2) ensuring flexibility for the government and the contractor in dealing with the wide range of operational situations that DoD and contractors may face, and (3) developing an appropriate and meaningful approach for contractors for combating trafficking in persons.

Analysis of Provisions

I. Scope of Coverage

The Background section accompanying the proposed rule references the deputy secretary's January 30, 2004 memo as requiring provisions to be incorporated in overseas services contracts (emphasis added). The relevant portion of that memo is quoted above. However, the proposed additional prescriptive section 225.7404-1 and the proposed clause are not limited to only overseas "services" contracts. We encourage the department to clarify the scope of coverage of these provisions in any final rule.

In addition, a question has been raised about whether this policy can be applied to contracts (and particularly subcontracts) performed overseas by non-U.S. contractors and vendors. This will be a significant issue with respect to prime contract awards, particularly in support of contingency operations, and unquestionably an administrative burden to impose such a flow-down requirement to all subcontracts awarded to non-U.S. companies overseas where the work is also performed overseas. We strongly encourage the department to assess the appropriateness of extending such requirement to non-U.S. contractors and subcontractors and the implication for compliance if those subcontractors and vendors refuse to accept or honor any such requirement.

II. Amendment to 212.301 – Commercial Items

This new provision would amend Section 212.301, relating to solicitation provisions and contract clauses for the acquisition of commercial items, by adding a new paragraph (f)(ix) to require the use of the Combating Trafficking in Persons Clause in all contracts that require performance outside the United States. While we share the view that contractors providing commercial items and services to the department should be aware of United States government policies, we have concerns about imposing the full brunt of the proposed contract clause in all commercial item procurements.

As you know, in accordance with Section 8002 of Public Law 103-355 (41 U.S.C. 264, note), contracts for the acquisition of commercial items shall, to the maximum extent practicable, include only those clauses required to implement provisions of law or executive orders applicable to the acquisition of commercial items or that are determined to be consistent with customary commercial practice. See FAR 12.301. As provided for in FAR 12.303, contracting officers may, within the limitations of that subpart, and after conducting appropriate market research, tailor the provision to adapt to the market conditions for each acquisition.

We believe the policy objectives of the President's NSPD-22 and the secretary's memo can be achieved by tailoring the clause in the proposed rule for commercial items to include only (1) the U.S. government's prohibition on any activities on the part of the contractor's employees that support or promote trafficking in persons, (2) the definitions and policy statements provided for in the proposed 252.225-70xx (a), (b), and (c), and (3) an additional provision that recommends that commerical item contractors establish policy and training procedures appropriate to their organization relating to the prohibition of any activities on the part of the contractor's employees that support or promote trafficking in persons. With these narrowly tailored provisions, even a commercial item contractor or contractor employee that engagess in the prohibited behavior would be subject to the full panoply of existing criminal, civil and administrative remedies already available to the government.

III. Amendment to 225.7404-1 -- Policy

This new proposed 7404-1(b) requires contracts with performance outside the United States to require contractors to develop procedures to "combat trafficking in persons." While we understand the thrust of the provision, we recommend clarifying the actions that contractors must take, and thus modify this paragraph to state:

> "(b) Requires contractors to develop policy and procedures that prohibit any activities on the part of contractor employees that support or promote trafficking in persons."

A similar change should be made to paragraph (e) of the proposed clause.

IV. Addition of 252.225-70XX – Solicitation Provisions and Contract Clauses
A new clause entitled "Combating Trafficking in Persons" is proposed.

1. Paragraph (a) provides definitions; each of the substantive definitions (other than for the Combatant Commander) are taken verbatim from the Victims in Trafficking and Violence Protection Act of 2000, as amended, and we support their inclusion in the clause.

2. Paragraph (b) restates the "zero tolerance" policy of the United States and we support its inclusion in the clause.

3. Paragraph (c) provides requirements on the contractor and we support its inclusion in the clause.

4. Paragraph (d) imposes on the contractor the requirement for obtaining copies of all of the policies, laws, regulations, and directives referred to in paragraph (f) of the clause, and for providing any necessary legal guidance and interpretations for its personnel regarding such policies, laws, regulations and directives. As a threshold matter, we are concerned that the overwhelming majority of contractors that are awarded contracts for the performance of work overseas will not have access to all of these documents, particularly those non-public documents such as "all host nation laws" and "directives from combatant commanders or designated representatives" that apply to contractors; contractors could even be denied access to some of these documents in advance of contract award and a "need to know." There would be a further implementation challenge to ensure that this data collection and analysis effort is kept continuously current. In our view, if the contractor were to adopt its own appropriate "zero tolerance" or similar policy for its company and employees, having possession of all of these documents is irrelevant. In light of our support for a provision requiring the contractor to adopt a zero tolerance policy, we recommend that this provision be deleted from any final rule.

Many contractors already provide legal guidance and interpretations to their employees regarding these trafficking laws and regulations. However, we know that the vast majority of DoD contractors, particularly small businesses and contractors providing commercial items to the department, do not know non-U.S. host country laws and policies and are in no position to provide meaningful legal advice to their employees except on a case-by-case, emergency, basis. Beyond the training requirements addressed in paragraph (f), which we comment on below, we see no benefit to imposing this requirement as a matter of contract coverage, and recommend that it be deleted from any final rule.

5. Paragraph (e) requires the contractor to establish policy and procedure "for combating trafficking in persons." As noted above in the discussion about the policy prescription for the clause, we understand the thrust of the provision and recommend clarifying the actions that contractors must take, and thus suggest modifying this paragraph to state:

> "(e) Requires contractors to develop policy and procedures that prohibit any activities on the part of contractor employees that support or promote trafficking in persons."

6. Paragraph (f) requires contractors to provide training to make its employees aware of the prescribed list of trafficking laws and regulations. CODSIA generally supports the need for appropriate training on the U.S. government's and the company's policies opposing trafficking in persons, except for the scope of documents that contractors are required to obtain. We strongly recommend that this paragraph permit the contractor to tailor its training program to the size and nature of the overseas work, the number of employees engaged in performance of work outside the United States, and the nature of the work to be performed. We recommend that the Department consider revising this training requirement to adopt the approach used in the Contractor Standards of Conduct policy at 203.7000(1), to provide as follows:

> "Contractors shall provide training suitable to the size of the company and the extent of their involvement in overseas contracting."

In addition, we are concerned about the directive in subparagraph (f)(3) that requires policy and training relating to "those laws for which jurisdiction is established by the Military Extraterritorial Jurisdiction Act of 2000 (18 U.S.C. 3261, 3267)" ("MEJA"). MEJA is a procedural statute and while U.S. criminal jurisdiction may be "established" by the Act, there is little advantage to the company or the employee discussing the contours of MEJA except to acknowledge that violations of certain U.S. criminal laws may still result in prosecutions in the United States even if the conduct takes place overseas. We recommend this provision be deleted.

7. Paragraph (g) requires the contractor to inform the contracting officer of "any information it receives from any source" that alleges a contractor employee or subcontractor has engaged in conduct that violates U.S. government policy concerning trafficking in persons. We are very concerned about the appropriateness and potential liabilities of imposing on a contractor or a contractor employee the obligation to report to the contracting officer (and through the contracting officer to the combatant commander, pursuant to proposed 25.7404-2) "any information" received – whether based on rumor or fact, whether from personal knowledge or otherwise, and whether there is a basis to believe or know the accuracy of the information. At a minimum, there should be at least some scintilla of a factual basis before such disclosure is required. For example, the subcontractor compliance requirement imposed by subparagraph (i)(1) of this clause imposes an action on contractors only "when the contractor <u>obtains sufficient evidence</u> to determine that the subcontractor is not in compliance with its contractual obligations regarding trafficking in persons" (emphasis added). The DFARS Standards of Conduct policy at 203.7000(3) requires the contractor to "facilitate <u>timely discovery</u> and disclosure of <u>improper</u> conduct" (emphasis added). We strongly recommend that this paragraph (g) be carefully revised to permit the contractor flexibility in both the timing and the nature of the disclosure to be required. At a minimum, we recommend adopting the "sufficient evidence" standard as provided for in paragraph (i) in this proposed clause.

8. Paragraph (h) requires the contractor to take appropriate "employment action" against any employees who "engage in sex trafficking or any other activity that may support trafficking in persons, or who otherwise violate a policy, law, regulation or directive described in paragraph (f)." As we noted in several sections above, we are very concerned about the requirement for contractors to obtain and keep current with an unlimited number of documents, to train all employees on this unlimited and evolving list, and then subject the contractor to take employment action and an employee to face employment action for any violation of any matter on the list. We recommend that the cross-reference to paragraph (f) be deleted. Here again, we find the coverage of a directly related matter in the DoD Contractor Standards of Conduct rule to be an appropriate model and recommend that it be the basis for revising this paragraph (h); Section 203.7000(4) requires that contractors have standards and internal control systems for "ensuring corrective measures are promptly instituted and carried out," while Section 203.7001(5) requires that contractors' management control systems provide "disciplinary action for improper conduct." This paragraph (h) also states that such appropriate employment action "include(e) removal from the host nation or dismissal." We recommend adding before the phrase "including removal" the phrase "up to and" to demonstrate that there is a range of personnel actions the contractor could take, as appropriate, if there is a violation, based on such factors as the nature of the violation (e.g. technical versus substantive), the level of the employee (e.g. supervisor or executive), or whether training or other remedial action would mitigate the effect of the violation.

9. Paragraph (i) requires contractors to ensure that its subcontractors comply with the provisions of the clause. Except for our concerns discussed above relating to the scope of coverage of the rule and in particular the application to non-U.S. subcontractors and its application to commercial item contracts, we do not object to the provision.

10. Paragraph (j) provides a list of additional remedies the contracting officer may employ for the contractor's "failure to comply with" the whistleblower provisions in paragraph (g), the employment actions in paragraph (h), or the subcontract compliance obligations in subparagraph (i). Among the remedies included is a suspension of contract payments. While we recognize that the contracting officer has a wide range of administrative and civil remedies available for a contract breach, we are very concerned with the use of suspension of payments for work already performed, particularly when a violation is not associated with the tasks to be performed under the contract, and when the list of remedies included in the clause appears to cascade from administratively simple (suspend payments) to administratively complex (propose for suspension or debarment). At a minimum, we recommend that in each of these cases the contractor be notified and given the opportunity to address the alleged violation before administrative action is taken and that the DFARS PGI address procedures the contracting officer is to follow before concluding that there is a "failure to comply" and employing any of these or other remedies.

11. Paragraph (k) requires the flow down of this clause to all subcontracts that require performance outside the United States. In addition to the issues regarding the scope of coverage raised above, we recommend that the department consider revising this flow-down requirement to adopt the flow-down approach included in the Contractor Standards of Conduct clause at 252.203-7001(g), as follows:

> "The contractor agrees to include the substance of this clause, appropriately modified to reflect the relationship of the parties, in all first tier subcontracts exceeding the simplified acquisition threshold in Part 2 of the Federal Acquisition Regulation, except those for commercial items or components."

V. Government-wide application

The President's directive applies government-wide. The United States Agency for International Development (USAID) has developed its own (very dissimilar) clause to be included in its contracts. (See USAID Acquisition and Assistance Policy Directive 05-04, June 9, 2005, available at: http://www.usaid.gov/business/business_opportunities/cib/pdf/aapd05_04.pdf.)

Other agencies may be working on their own policies and contract clauses. According to this USAID directive, USAID is seeking the FAR Council approval for coverage, although we did not see any such case listed in the August 12, 2005 edition of the FAR case management system. However, that August FAR edition includes a related FAR Case (2005-012) pending review at the Office of Information and Regulatory Affairs that provides for an interim rule to implement Section 3(b) of the ``Trafficking Victims Protection Reauthorization Act of 2003" (P.L. 108-193). That section amends the 2000 Act to provide that:

> "(1) The President shall ensure that any grant, contract, or cooperative agreement provided or entered into by a Federal department or agency under which funds described in paragraph (2) are to be provided to a private entity, in whole or in part, shall include a condition that authorizes the department or agency to terminate the grant, contract, or cooperative agreement, without penalty, if the grantee or any subgrantee, or the contractor or any subcontractor (i) engages in severe forms of trafficking in persons or has procured a commercial sex act during the period of time that the grant, contract, or cooperative agreement is in effect, or (ii) uses forced labor in the performance of the grant, contract, or cooperative agreement.
> ``(2) Funds referred to in paragraph (1) are funds made available to carry out any program, project, or activity abroad funded under major functional budget category 150 (relating to international affairs)."

We are not aware of the contents of the proposed FAR rule or the timing of publication. However, we believe there is a high potential for substantial overlap between that FAR case and this DFARS case. At a minimum, we strongly encourage DoD to withhold any further regulatory action on this DFARS rule until after FAR action is complete.

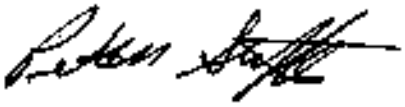
Conclusion

CODSIA members support the U.S. government's policy of combating trafficking in persons. Our comments are intended to improve the implementation of the rule, clarify coverage and provide contractors with an appropriate and meaningful approach to combat trafficking in persons.

Thank you for your attention to these comments. If you have any questions or need any additional information, please contact Alan Chvotkin of the Professional Services Council, who serves as our point of contact for this matter. Alan can be reached at (703) 875-8059 or at chvotkin@pscouncil.org.

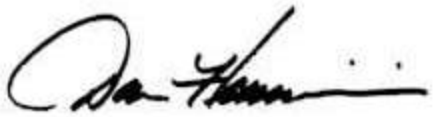
Sincerely,

Alan Chvotkin
Senior Vice President & Counsel
Professional Services Council



Peter Steffes
Vice President, Government Policy
National Defense Industrial Association

Cynthia Brown
President
American Shipbuilding Association



Dan Heinemeier
President, GEIA
Electronic Industries Alliance

Chris Jahn
President
Contract Services Association